Office-Supreme Court, U.S.
FILED
JAN 9 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-870

In the
Supreme Court of the United States

OCTOBER TERM, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION OF APPELLEE SOUTH CENTRAL BELL TELEPHONE COMPANY TO DISMISS OR AFFIRM

HERSCHEL L. ABBOTT, JR.,
Counsel of Record
JAMES P. BROWNING, JR.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street, 18th Floor
New Orleans, Louisiana 70118
Telephone: (504) 581-6641

M. ROBERT SUTHERLAND
CHARLES G. RIVET
Room 1870, 365 Canal Street
New Orleans, Louisiana 70140
Telephone: (504) 528-2050

COUNSEL FOR APPELLEE,
SOUTH CENTRAL BELL
TELEPHONE COMPANY

January 7, 1985

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Can a private party secure an injunction from a federal court pursuant to 47 U.S.C. §401(b) enjoining a state utilities commission to obey a presumptively valid order of the Federal Communications Commission?

2. When a state utilities commission fails to obey an injunction issued pursuant to 47 U.S.C. §401(b), can a federal district court modify its injunction so as to require the state utilities commission to allow the recovery of the level of increased expenses which the state utilities commission itself established as having resulted from application of the presumptively valid Federal Communications Commission Order?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

MOTION OF APPELLEE SOUTH CENTRAL BELL TELEPHONE COMPANY TO DISMISS OR AFFIRM 1

INTRODUCTION 2

CONSTITUTIONAL PROVISIONS, FEDERAL ORDERS, STATUTES AND REGULATIONS INVOLVED 3-4

STATEMENT OF THE CASE 4

A. *Factual Background* 4

B. *Proceedings Below* 9

SCOPE OF REVIEW 10

MOTION TO DISMISS 11

A. *No "State statute" was held invalid* 12

B. *A preliminary injunction cannot be appealed under 28 U.S.C. §1254(2)* 13

MOTION TO AFFIRM 14

A. *47 U.S.C. §401(b) provides an express remedy to private parties against state public service commissions* 14

B. *The district court below did not abuse its discretion in granting and subsequently modifying the preliminary injunction* 20

CONCLUSION 23

Appendix A

FEDERAL COMMUNICATIONS COMMISSION ORDER

In the Matter of The Prescription of Revised Percentages of Depreciation, Docket No. 82-576, 92 F.C.C. 2d 693 (1982) B-1

Appendix B

TESTIMONY AND EVIDENCE FROM PROCEEDINGS BELOW

Excerpt from transcript of hearing on Plaintiff's motion for preliminary injunction B-20

Declaration of William J. Tricarico B-21

Affidavit of Lewis S. Quinn B-22

Appendix C

RECENT RELEVANT AND/OR UNPUBLISHED DECISIONS

Chesapeake and Potomac Tel Co. v. Pub. Serv. Com'n of Md., No. 83-1403 (4th Cir. Nov. 20, 1984) B-25

Southwestern Bell Tel. Co. v. State Corp. Com'n of Kansas, No. 83-4090 (D. Kan. April 8, 1983) B-36

Wisconsin Bell, Inc. v. Public Service Com'n of Wisconsin, Civil Action No. 84-C-4 (E.D. Wis. November 13, 1984) B-40

Appendix D

FEDERAL STATUTES AND REGULATIONS

5 U.S.C. §552(a)(1) B-50

28 U.S.C. §1254(2) B-51

28 U.S.C. §2342(1) B-51

28 U.S.C. §2349(2) B-52

47 U.S.C. §401 . . . . . B-53

47 U.S.C. §402(a) B-54

49 U.S.C. §16(12) B-54

47 C.F.R. §0.455 . . . . . B-55

TABLE OF AUTHORITIES

CASES **Page**

Alabama Nursing Home Ass'n v. Harris, 617 F.2d 385 (5th Cir. 1980) 11, 22

Aluminum Co. of America v. Utilities Comm'n, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, __ U.S. __, 104 S.Ct. 1326 (1984) 15

Ambassador, Inc. v. United States, 325 U.S. 317, 65 S.Ct. 1151 (1945) 18

Atchison, T. & S. F. Ry. Co. v. Lennan, 640 F.2d 255 (10th Cir. 1981) 20

Baggett v. Department of Professional Regulation, 717 F.2d 521 (11th Cir. 1983) 15

Barnwell Drilling Co. v. Sun Oil Company, 300 F.2d 298 (5th Cir. 1962) 11

Bradford Electric Light Co. v. Clapper, 284 U.S. 221, 52 S.Ct. 118 (1931) 13

Brown v. Chote, 411 U.S. 452, 93 S.Ct. 1732 (1973) 11

Cabot Corporation v. Public Service Com'n of W. Va., 332 F.Supp. 370 (S.D. W. Va. 1971) 23

Canal Authority of State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974) 22

Capital Service v. National Labor Relations Board, 347 U.S. 501, 74 S.Ct. 699 (1954) 22

Chesapeake and Potomac Tel. Co. v. Pub. Serv. Com'n of Md., No. 83-1403 (4th Cir. Nov. 20, 1984) 15, 16, 18

Chicago v. Atchison, T. & S. F. Ry. Co., 357 U.S. 77, 78 S.Ct. 1063 (1958) 13

Cincinnati Bell Tel. Co. v. Pub. Utilities Com'n of Ohio, 12 Ohio St. 3d 280, 466 N.E. 2d 848 (1984), *appeal pending*, Docket No. A-70, 1984 Term (U.S.) 17

Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 62 S.Ct. 1194 (1942) 19

Detroit Football Company v. Robinson, 283 F.2d 657 (5th Cir. 1960) 11
Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561 (1975) 13
F.C.C. v. ITT World Communications, Inc., __ U.S. __, 104 S.Ct. 1936 (1984) 10
Fornaris v. Ridge Tool Co., 400 U.S. 41, 91 S.Ct. 156 (1970) 11
Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228 (1958) 12
Illinois Bell Telephone Co. v. Ill. Commerce Com'n, 740 F.2d 566 (7th Cir. 1984) 19
International Brotherhood of Electrical Workers, v. Public Service Comm'n, 614 F.2d 206 (9th Cir. 1980) 15
J. M. Fields of Anderson, Inc. v. Kroger Co., 310 F.2d 562 (5th Cir. 1962) 11
Matter of Chicago, Milwaukee, St. Paul & P. R. Co., 738 F.2d 209 (7th Cir. 1984) 20
Mountain States Tel. & Tel. Co. v. Dept. of Pub. Serv., 588 F.Supp. 5 (D. Mon. 1983) 16
New England Tel. & Tel. Co. v. Public Util. Comm. of Maine, 570 F.Supp. 1158 (D. Me. 1983), *rev'd*, 742 F.2d 1 (1st Cir. 1984), *petition for cert. pending*, No. 84-900 (U.S.) 16, 17, 18
New England Tel. & Tel. v. Pub. Serv. Bd. of Vt., 576 F.Supp. 490 (D. Vt. 1983) 16, 17
Pac. N. W. Bell Tel. v. Wash. Util. & Transp. Com'n, 565 F.Supp. 17 (W.D. Wash. 1983) *appeal docketed*, No. 83-3746 (9th Cir. April 7, 1984) 16, 18
Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948 (1983) 12
Public Service Comm. of Indiana v. Batesville Tel. Co., 284 U.S. 6, 52 S.Ct. 1 (1931) 11

Public Utilities Com. v. United Fuel Gas Co.,
317 U.S. 456, 63 S.Ct. 369 (1943) 23
Re Application of Northwestern Bell Tel. Co.,
218 Neb. 563 (1984) 18
Re N.Y. Tel. Co. v. Pub. Serv. Com'n of N.Y.,
98 A.D. 2d 535 (N.Y. App. Div. 1984) 18
Sierra Club v. Callaway,
499 F.2d 982 (5th Cir. 1974) 22
Silkwood v. Kerr-McGee Corp.,
__ U.S. __, 104 S.Ct. 615 (1984) 12, 13
Slaker v. O'Connor,
278 U.S. 188, 49 S.Ct. 158 (1929) 13
South Carolina Electric & Gas Co. v. Flemming,
351 U.S. 901, 76 S.Ct. 692 (1956) 13
South Central Bell Tel. Co. v. Louisiana Public Service Com'n, 570 F.Supp. 227 (M.D. La. 1983) 9, 10
South Cent. Bell Tel. v. La. Pub. Serv. Com'n,
744 F.2d 1107 (5th Cir. 1984) 10, 18
Southwestern Bell Tel. v. Ark. Pub. Serv.,
738 F.2d 901 (8th Cir. 1984), *petition for cert. pending*, No. 84-483 (U.S.) 18
Southwestern Bell Tel. Co. v. State Corp. Com'n of Kansas, No. 83-4090 (D. Kan. April 8, 1983) 16
Suntex Dairy v. Bergland,
591 F.2d 1063 (5th Cir. 1979) 12
Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.,
270 U.S. 266, 46 S.Ct. 263 (1926) 20
Trailer Train Co. v. State Bd. of Equalization,
697 F.2d 860 (9th Cir.), *cert. denied*,
__ U.S. __, 104 S.Ct. 149 (1983) 20
Union Springs Tel. v. Ala. Pub. Serv. Com'n,
437 So.2d 485 (Ala. 1983) 18
United States v. Arlington,
669 F.2d 925 (4th Cir.), *appeal dismissed and cert. denied*, 459 U.S. 801, 103 S.Ct. 23 (1982) 13

United States v. City and County of San Francisco, 310 U.S. 16, 60 S.Ct. 749 (1940) 20
United States v. Corrick, 298 U.S. 435, 56 S.Ct. 829 (1936) 11
Virginia State Corp. Com'n v. F.C.C., 737 F.2d 388 (4th Cir. 1984), *appeal pending sub nom Louisiana Pub. Ser. Com'n v. F.C.C.*, No. 84-871, 1984 Term (U.S.) 2
Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663 (1946) 12, 13
Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin, Civil Action No. 84-C-4 (E.D. Wis. November 13, 1984) 16

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitutional Provisions

U.S. Const. art. VI, cl. 2 3

Statutes

Administrative Procedure Act §552(a)(1), 5 U.S.C. §552(a)(1) 17
28 U.S.C. §1254(2) . . . . . *passim*
Johnson Act, 28 U.S.C. §1342 14
28 U.S.C. §2342(1) 2, 10
28 U.S.C. §2349(2) 3
Federal Communications Act §153, 47 U.S.C. §153 15
Federal Communications Act §401(b), 47 U.S.C. §401(b) . . . . . *passim*
Federal Communications Act §402, 47 U.S.C. §402 . . . . . 2, 10
Interstate Commerce Act §16(12), 49 U.S.C. §16(12) 19

Regulations

47 C.F.R. §0.455(e) 17

ADMINISTRATIVE ORDERS AND DECISIONS

Amendment of Part 31, Docket No. 20188, 83 F.C.C. 2d 267 (1980), *on reconsideration,* 87 F.C.C. 2d 916 (1981) 4

Amendment of Part 31, 85 F.C.C. 2d 818 (1981), *on reconsideration,* 89 F.C.C. 2d 1094 (1982) 6

Ex parte South Central Bell Telephone Co., Order No. U-15445 (La. Pub. Serv. Comm'n 1983) 9

In the Matter of Amendment of Part 31, Uniform System of Accounts, Docket No. 79-105, 92 F.C.C. 2d 864 (1982) 6

In the matter of The Prescription of Revised Percentages of Depreciation, Docket No. 82-576, 92 F.C.C. 2d 693 (1982) 6, 7

Reaffirmation of the applicability of state regulatory principles, (La. Pub. Serv. Comm'n 1982) 4

LEGISLATIVE REPORTS

H. R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934) 19

S. Rep. No. 781, 73d Cong., 2d Sess. 9 (1934) 19

No. 84-870

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LOUISIANA PUBLIC SERVICE COMMISSION,
THOMAS E. POWELL, GEORGE J. ACKEL,
ED KENNON, LOUIS LAMBERT AND
JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION OF APPELLEE SOUTH CENTRAL BELL TELEPHONE COMPANY TO DISMISS OR AFFIRM

The Appellee, South Central Bell Telephone Company,[1] respectfully moves to dismiss or affirm the

[1] At the time this action was filed, South Central Bell Telephone Company was a subsidiary of American Telephone & Telegraph Company ("AT&T"). On January 1, 1984, AT&T divested itself of its regional operating companies and South Central Bell Telephone Company became a subsidiary of BellSouth Corporation. Its sister subsidiaries are BellSouth Services, BellSouth Advertising & Publishing Company, BellSouth Mobility, Southern Bell, BellSouth Advanced Systems, Inc., BellSouth Enterprises and Sunlink, Inc.

judgment of the United States Court of Appeals for the Fifth Circuit in this case. Rule 16.1(a), (c) and (d).

INTRODUCTION

This case represents an appeal from a preliminary injunction which was awarded by a Federal District Court to enforce an order of the Federal Communications Commission (hereinafter "FCC") which preempted state ratemaking authority with respect to certain depreciation practices and methodologies. That Preemption Order is also being appealed by the Louisiana Public Service Commission (hereinafter "LPSC"), appellant herein, in a separate proceeding before the Court after having been affirmed by the Fourth Circuit. *Louisiana Pub. Ser. Com'n v. F.C.C.*, Docket No. 84-871, 1984 Term (U.S.).

For the purpose of this case, the lower courts were required by statute to presume that the Preemption Order was valid. 47 U.S.C. §402; 28 U.S.C. §2342(1). Indeed, South Central Bell Telephone Company (hereinafter "South Central Bell") readily admits that the injunction issued in its favor is totally dependent upon the validity of the Preemption Order. Therefore, this Court should postpone any consideration of this action until after such time as it has reached a decision in Docket No. 84-871. Such a postponement is particularly appropriate in the light of the circumstances underlying this case.

This appeal reaches this Court only because of the LPSC's decision to employ self-help. At the time the Preemption Order was issued, the LPSC had the option to appeal that Order to a Circuit Court of Appeals. Indeed, the LPSC eventually intervened in an appeal of the Preemption Order which was taken by the Virginia State

Corporation Commission to the Fourth Circuit Court of Appeals but did not seek a stay of the Preemption Order as it could have done pursuant to 28 U.S.C. §2349(2). Instead, rather than follow the proper procedure of obeying the Preemption Order while challenging its validity through the correct judicial channels, the LPSC instead chose to envoke the doctrine of nullification by disregarding a valid federal law through a claim of sovereign independence.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL ORDERS INVOLVED

In addition to the FCC order set forth at pages A-57 through A-93 of the Appendix to the Jurisdictional Statement in this case, the following FCC Order, set out in the Appendix hereto, is also involved in this case.

In the Matter of The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended for:...South Central Bell Telephone Company..., 92 F.C.C. 2d 693 (1982).

FEDERAL STATUTES AND FEDERAL REGULATIONS INVOLVED

The following federal statutes and federal regulations, set forth in the Appendix commencing at Page B-50, are involved in this case:

5 U.S.C. §552(a)(1)
28 U.S.C. §1254(2)
28 U.S.C. §2342
28 U.S.C. §2344
47 U.S.C. §401
47 U.S.C. §402(a)
49 U.S.C. §16(12)
47 C.F.R. §0.455(a-e)

STATEMENT OF THE CASE

This is an appeal of a preliminary injunction which required the LPSC to comply with a presumptively valid FCC order preempting state ratemaking authority with respect to the depreciation of certain telephone plant and equipment.

A. *Factual Background*

In approximately 1973 the FCC began to study the depreciation of telephone plant and equipment. In 1980 it adopted the "remaining-life" and "straight-line equal life group" (SLELG) depreciation methods. Docket No. 20,188, 83 F.C.C. 2d 267 (1980), *on reconsideration*, 87 F.C.C. 2d 916 (1981). In reaction to the increased activity of the FCC injecting competition into the telephone industry and its related modification of depreciation and accounting practices, the LPSC issued its General Order of June 30, 1981, entitled *Reaffirmation of the Applicability of State*

Regulatory Principles to telephone terminal equipment and telephone accounting practices. Appendix to Jurisdictional Statement, pp. A-109 through A-116. Therein the LPSC stated:

> In order to place the FCC and South Central Bell Telephone Co. on notice of the regulatory policy of this State as it relates to the policies announced by the FCC, this Commission hereby orders:
>
> (1) The marketing of terminal equipment by communications common carriers will continue to be the subject of rate regulation by this Commission, even after March 1, 1982. This order will apply to any attempt of the Bell System to market this equipment through a separate subsidiary.
>
> (2) Depreciation rates for imbedded terminal equipment, and all other equipment historically regulated in the intrastate jurisdiction, will be set according to policies approved in this State. They will not be established to further a policy of "deregulation" of the FCC.
>
> (3) Changes in accounting procedures proposed by common carriers will be examined for their consistency with the approved regulatory practice of this State and will be approved or disapproved on this basis, and this basis only.
>
> The staff, special counsel and consultants of the Commission are instructed to take the necessary actions to ensure the implementation of this Order. The Order does not reflect any change in the regulatory policy of this Commission. However, it is necessary in light of the policies announced by the FCC.

Id. at A-15.

On May 3, 1982, South Central Bell filed tariff revisions with the LPSC seeking an increase in intrastate rates. As partial justification for the increased revenues, South Central Bell relied upon the FCC's adoption of remaining life and SLELG depreciation methods in 1980 and the FCC's ruling in 1981 requiring the expensing of station connections (Docket No. 79-105, 85 F.C.C. 2d 818 (1981), *on reconsideration,* 89 F.C.C. 2d 1094 (1982)).

During 1982 the FCC continued its review of the depreciation methods to be applied to the telephone plant and equipment of the various regional telephone companies. On August 13, 1982, the staff sent review letters to the regional Bell Telephone Companies and the respective state commissions outlining the FCC's recommendations for the implementation of SLELG rates. The LPSC received such a letter, and responded by asserting that it had not authorized South Central Bell to use the SLELG method for intrastate ratemaking purposes. *See, In the Matter of The Prescription of Revised Percentages of Depreciation,* Docket No. 83-576, 92 F.C.C. 2d 693 (1982), Appendix p. B-1.

On December 22, 1982, the FCC adopted the two orders which South Central Bell sought to enforce in this proceeding. The first of those was *In the Matter of Amendment of Part 31, Uniform System of Accounts,* Docket No. 79-105, 92 F.C.C. 2d 864 (1982); Appendix to Jurisdictional Statement, p. A-57 (hereinafter the "Preemption Order"). Therein, addressing directly the question of whether depreciation methodologies and practices should preempt state ratemaking authority in that area, the FCC stated, "Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are

accordingly void." Appendix to Jurisdictional Statement, p. A-82. The FCC went on to state:

> We note that petitioner and the parties supporting the petition cite several states that have indicated that they do not intend to follow the Commission's depreciation prescriptions or expensing of inside wiring, or have refused to follow either. In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies. Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates.

Id. at A-83. The Preemption Order concluded by directing that the Secretary of the FCC cause it to be published in the *Federal Register* and also cause a copy to be served on each state commission.

The second order adopted by the FCC on December 22, 1982, was *The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended,* Docket No. 82-576, 92 F.C.C. 2d 693 (1982); Appendix p. B-1 (hereinafter the "Prescription Order"). Therein, the FCC prescribed revised depreciation rates for eleven Bell Operating Telephone Companies, including South Central Bell, using the SLELG method. Appendix p. B-2. Noting the comments received from the LPSC and other state commissions, the FCC stated:

> Several state commissions stated that they have not approved the SLELG procedures for their jurisdictions. The presence or absence of state commission approval of SLELG rates does not control the prescription of SLELG rates in this order. The prescription of depreciation rates is plainly a matter within the Commission's jurisdiction under Section 220(b) of the Communications Act. We have today ruled that such depreciation orders are binding at both the federal and state levels. [Cite to Preemption Order omitted.]

Id. at p. B-12.

The Prescription Order was not appealed by the LPSC and is therefore final. 570 F.Supp. at 230, Appendix to Jurisdictional Statement at A-37.

On or about January 7, 1983, the FCC mailed copies of its Preemption Order to the LPSC. *See* Declaration of William J. Tricarico, Record pp. 103-104 and Appendix p. B-21, Affidavit of Lewis S. Quinn, Record pp. 134-136 and Appendix pp. B-22 through B-24. On January 19, 1983, the Preemption Order was published in the *Federal Register.*

In order to ensure that the LPSC had actual notice of the Preemption Order, on January 17 or 18, 1983, South Central Bell introduced a certified copy of it into the record compiled before the LPSC during its hearings concerning South Central Bell's proposed rate revisions. Transcript of June 3, 1983 hearing below, p. 78 and Appendix p. B-20.

On May 19, 1983, the LPSC denied South Central Bell's request for a rate increase, thereby refusing to implement the FCC-mandated depreciation methods and prescribed depreciation rates. Jurisdictional Statement, pp. A-99

through A-101; *Ex parte South Central Bell Telephone Co.*, Order No. U-15445 (La. Pub. Serv. Comm'n 1983), Record at pp. 48-80, Appendix to Jurisdictional Statement at A-99 through A-101.

B. *Proceedings Below*

Shortly after the LPSC denied South Central Bell's request for a rate increase, suit was filed in the Middle District of Louisiana seeking a preliminary and permanent injunction requiring the LPSC to implement the depreciation methodologies and expensing of station connections mandated by the FCC in the Preemption Order and the Prescription Order. Following a hearing, the district court found that it had jurisdiction under 47 U.S.C. §401(b) and that the prerequisites of that provision had been met. However, rather than issue a dollar-specific injunction, the court ordered the LPSC to comply generally with the Preemption Order and to set new rates within ten days. *South Central Bell Tel. Co. v. Louisiana Public Service Com'n.*, 570 F.Supp. 227, 232-34 (M.D. La. 1983); Appendix to Jurisdictional Statement, p. A-47.

On July 7, 1983, the Louisiana Commission, pursuant to the preliminary injunction, issued an order setting new rates. During the time between its initial order denying South Central Bell any increased rates and the July 7 order, no new evidence was received by the LPSC. In the July 7 order, the LPSC found that application of the FCC-prescribed accounting methods resulted in an increased expense level of $40,506,000. However, the LPSC ordered a reduction in the rate of return from 13.5% to 12%, and then found that an increase in revenue of only $12,700,000 was needed to meet those increased costs. Appendix to Jurisdictional Statement, pp. A-102 through A-108.

South Central Bell immediately returned to the District Court seeking to modify the preliminary injunction or, alternatively, to have the LPSC held in contempt. The District Court, stressing the fact that the LPSC had acted in an arbitrary and capricious manner by engaging in "a simple exercise in arithmetic designed to minimize the increase in telephone rates", concluded that it had no alternative but to accept the LPSC's finding that South Central Bell had increased expenses of $40,506,000 and to require the LPSC to increase rates sufficiently to cover that amount. 570 F.Supp. at 237-38; Appendix to Jurisdictional Statement, p. A-55.

On appeal, the Fifth Circuit held that South Central Bell was entitled to enforce the Preemption Order under 47 U.S.C. §401(b), and further found that the trial court had not erred in modifying its injunction. *South Cent. Bell Tel. v. La. Pub. Serv. Com'n*, 744 F.2d 1107 (5th Cir. 1984). The Fifth Circuit's decision was rendered on October 11, 1984. The LPSC filed its Notice of Appeal on November 16, 1984. Its jurisdictional statement was received by South Central Bell on November 29, 1984.

SCOPE OF REVIEW

Overriding all other aspects of this case is the fact that the merits of the Preemption Order which South Central Bell seeks to enforce are not before the Court in this proceeding. Indeed, as was recognized by both the district and circuit courts below, federal statutes specifically preclude review of the merits of the Preemption Order in this case. 47 U.S.C. §402; 28 U.S.C. §2342(1); *accord, F.C.C. v. ITT World Communications, Inc.*, __ U.S. __, 104 S.Ct. 1936, 1939 (1984). Therefore, in considering the findings of the lower courts, it must be presumed that the Preemption Order is valid.

This Court's review of the proceedings below is further restricted by the statute under which the LPSC has chosen to pursue its appeal, 28 U.S.C. §1254(2). This Court has previously emphasized that statutes authorizing appeals are to be strictly construed. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1, 91 S.Ct. 156, 157 n.1 (1970). Under the express terms of §1254(2), the Court of Appeal's decision must be based squarely on a finding that a state statute relied upon by the LPSC is contrary to federal law, and this Court's review is restricted to the federal questions presented by that holding. *Public Service Comm. of Indiana v. Batesville Tel. Co.*, 284 U.S. 6, 52 S.Ct. 1 (1931).

Finally, as with all appeals of interlocutory decisions, this Court's review of the lower court's decision should be limited to the question of whether the court abused its discretion. *United States v. Corrick*, 298 U.S. 435, 56 S.Ct. 829 (1936); *Brown v Chote*, 411 U.S. 452, 93 S.Ct. 1732 (1973); *Detroit Football Company v. Robinson*, 283 F.2d 657 (5th Cir. 1960); *Barnwell Drilling Co. v. Sun Oil Company*, 300 F.2d 298 (5th Cir. 1962); *J. M. Fields of Anderson, Inc. v. Kroger Co.*, 310 F.2d 562 (5th Cir. 1962). Additionally, in reviewing an order enforcing an injunction great deference is due the interpretation placed on the terms of the injunctive order by the court which issued and must enforce it. *Alabama Nursing Home Ass'n. v. Harris*, 617 F.2d 385, 388 (5th Cir. 1980).

MOTION TO DISMISS

South Central Bell hereby moves to dismiss the appeal on the ground that it is not within this Court's jurisdiction because it was not taken in conformity with 28 U.S.C. §1254(2). Since no "State statute" was held invalid by the Court of Appeals, the LPSC cannot pursue an

appeal under that statute. Secondly, this court should dismiss the appeal because the decision below does not constitute a final decision which is appealable under 28 U.S.C. §1254(2). Finally, this appeal should be dismissed because it is apparent that the decision below was correct, and that the questions on which the decision of the case depend are so unsubstantial as to not need further argument.

A. *No "State statute" was held invalid*

Before jurisdiction can be found under 28 U.S.C. §1254(2), it must be established that the decision of the Court of Appeals was based squarely on a finding that a state statute relied upon by the appellant is contrary to federal law. This Court has consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute. While the former come within the scope of §1254(2)'s jurisdictional grant, the latter do not. *Silkwood v. Kerr-McGee Corp.*, __ U.S.__, 104 S.Ct. 615, 621 (1984); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 42-43, 103 S.Ct. 948, 953 (1983); *Hanson v. Denckla*, 357 U.S. 235, 244, 78 S.Ct. 1228, 1234 (1958); *Wilson v. Cook*, 327 U.S. 474, 482, 66 S.Ct. 663, 667 (1946). The injunction issued below did not, and could not, affect any "State statute". Rather, it merely operated to enjoin certain conduct by the LPSC and its individual Commissioners. An injunction decree operates *in personam. See, e.g., Suntex Dairy v. Bergland*, 591 F.2d 1063, 1068 (5th Cir. 1979).

Because the court below did not mention any "State statute", the parties did not contest or defend the constitutionality of any statute in their appellate briefs, and the

lower court's orders only dealt with courses of conduct rather than statutes authorizing that conduct, the present appeal is not within this Court's §1254(2) appellate jurisdiction. *Silkwood*, __ U.S. at __, 104 S.Ct. at 620-21; *Wilson v. Cook*, 327 U.S. at 481-82, 66 S.Ct. at 667; *Bradford Electric Light Co. v. Clapper*, 284 U.S. 221, 221-23, 52 S.Ct. 118, 118-19 (1931); *United States v. Arlington*, 669 F.2d 925 (4th Cir.), *appeal dismissed and cert. denied*, 459 U.S. 801, 103 S.Ct. 23 (1982).

Since no "State statute" was held invalid, this appeal should be dismissed for want of jurisdiction.

B. *A preliminary injunction cannot be appealed under 28 U.S.C. §1254(2)*

This Court has previously held that an appeal lies only from a final judgment or decree in cases where the validity of a state statute is drawn into question on the ground of repugnance to the Constitution, treaties or laws of the United States, and the decision is against its validity. *Slaker v. O'Connor*, 278 U.S. 188, 189-90, 49 S.Ct. 158, 159 (1929); *South Carolina Electric & Gas Co. v. Flemming*, 351 U.S. 901, 76 S.Ct. 692 (1956). Although arguments have been made that the requirement of finality is erroneous and should be overruled, *Chicago v. Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 82-83, 78 S.Ct. 1063, 1066-67 (1958) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927, 95 S.Ct. 2561, 2565-66 (1975), that position has never been adopted and the finality requirement still exists.

The propriety of such a requirement is illustrated by the appeal presented herein. As South Central Bell noted in its introduction, the basis for its injunction lies in the validity of the Preemption Order. The merits of that Order

cannot be reviewed in this action, and have been appealed to this Court by the LPSC in a separate proceeding. It therefore follows that a final decision can be rendered in this action only after the validity of the Preemption Order has been determined. Until such time, any appeal of this action should be dismissed.

MOTION TO AFFIRM

Alternatively, South Central Bell moves to affirm the judgment of the Fifth Circuit that a private party can obtain an injunction under 47 U.S.C. §401(b) and that the district court did not abuse its discretion in modifying its injunction so as to require the LPSC to allow the recovery of the amount of increased expenses which were determined by the LPSC itself. Additionally, it is manifest that the questions presented by the LPSC in its appeal are so unsubstantial as to not need further argument.

A. *47 U.S.C. §401(b) provides an express remedy to private parties against state public service commissions*

In its Jurisdictional Statement, the LPSC raises a variety of reasons why it believes a private party cannot obtain an injunction under §401(b) against a state public service commission. The first two of these, the Johnson Act, 28 U.S.C. §1342, and the doctrine of comity, can be summarily dismissed. As was held by the courts below, the Johnson Act is inapplicable because jurisdiction herein is based upon a specific federal statute rather than an alleged repugnance of the defendant's action to the Constitution. 744 F.2d at 1123, Appendix to Jurisdictional Statement, p. A-33; 570 F.Supp. at 234, Appendix to Jurisdictional Statement, pp. 45-46. Furthermore, this case is not an appropriate one for abstention pursuant to the doctrine of

comity. *Aluminum Co. of America v. Utilities Comm'n*, 713 F.2d 1024, 1030 (4th Cir. 1983), *cert. denied*, __ U.S. __, 104 S.Ct. 1326 (1984); *Baggett v. Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983); *International Brotherhood of Electrical Workers v. Public Service Comm'n*, 614 F.2d 206, 212 n.1 (9th Cir. 1980).

The LPSC next argues that South Central Bell should not be permitted a private action under §401(b) because it could have litigated the preemption issue in state court. This argument is refuted by the express language of §401(b) itself. Pursuance of an administrative or state remedy is not a condition precedent to an action under that statute.

Next the LPSC argues that it is not a "person" which was "duly served" with an "Order". This contention is without merit because South Central Bell's suit named as defendants not only the LPSC but also the individual officials comprising the LPSC. *Accord, Chesapeake and Potomac Tel. Co. v. Pub. Serv. Com'n of Md.*, No. 83-1403 (4th Cir. Nov. 20, 1984), Appendix p. B-25. Moreover, the LPSC is not the first defendant to assert that a state public service commission is not a "person" under §401(b). However, a careful analysis of the Communications Act of 1934 reveals this argument to be without merit. Initially, it should be noted that the definitions of "person" and "State Commission" are inclusive rather than exclusive. The introductory language of 47 U.S.C. §153 states that the definitions therein are provided "For the purpose of this chapter, unless the context otherwise requires—." Appendix to Jurisdictional Statement, p. A-136. Accordingly, the definition of "person" must be construed in light of the circumstances in which it is utilized. This requires that, because the term is being used in connection

with §401(b), it be construed in light of that section.

The term "any person" is incorporated in §401(b) in conjunction with the provision of an express remedy to injured parties whereby they might enforce valid FCC orders. It should be noted that §401(b) is the only section allowing for the enforcement of an FCC order, since §§401(a) and (c) are directed to the prosecution of violations of *provisions* of the Communications Act by the FCC. Congress could hardly have intended that state commissions be immune to enforcement of FCC orders merely on the grounds that they were not "persons" within the meaning of the only section permitting enforcement of those orders. *Accord, Chesapeake & Potomac Tel. Co. v. Pub. Serv. Com'n, supra; Pac. N. W. Bell Tel. v. Wash. Util. & Transp. Com'n,* 565 F.Supp. 17, 20-21 (W.D. Wash. 1983), *appeal docketed,* No. 83-3746 (9th Cir. April 7, 1984); *Mountain States Tel. & Tel. Co. v. Dept. of Pub. Serv.,* 588 F.Supp. 5, 7 (D. Mon. 1983); *New England Tel. & Tel. Co. v. Public Util. Comm. of Maine,* 570 F.Supp. 1558, 1568 (D. Me. 1983), *rev'd on other grounds,* 742 F.2d 1 (1st Cir. 1984), *petition for cert. pending,* No. 84-900 (U.S.); *Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin,* Civil Action No. 84-C-4 (E.D. Wis. November 13, 1984), Appendix p. B-40; *contra, New England Tel. & Tel. v. Pub. Ser. Bd. of Vt.,* 576 F.Supp. 490, 494-95 (D. Vt. 1983).

The LPSC next implies that the Preemption Order was not duly served upon it. However, no court which has been asked to enforce the Preemption Order has agreed with this argument. The majority of courts have enforced the Preemption Order, with several specifically examining the "duly served" requirement. *Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin, supra,* Appendix at B-40; *Southwestern Bell Telephone Company v. State*

Corp. Comm'n of Kansas, No. 83-4090 (D. Kan. April 8, 1983), Appendix at B-36. Those courts which have refused to enforce the Preemption Order have done so on grounds other than a finding that it was not "duly served." *New England Tel. & Tel. v. Pub. Ser. Bd. of Vt., supra; New England Tel. & Tel. v. Public Utilities, supra; Cincinnati Bell Tel. Co. v. Pub. Utilities Com'n of Ohio*, 12 Ohio St. 3d 280, 466 N.E. 2d 848 (1984), *appeal pending*, Docket No. A-70, 1984 Term (U.S.).

As held by the Fifth Circuit below, the majority of courts have found that requirement of "due service" is met if the defendant in a §401(b) proceeding received notice legally sufficient to make the order enforceable. 744 F.2d at 1119, Appendix to Jurisdictional Statement at A-24 through A-25. The LPSC received notice in four separate ways: (1) it was a party to the proceedings which resulted in the Prescription Order, which itself incorporated the Preemption Order; (2) it received a copy of the Preemption Order by mail from the FCC (*see* Declaration of William J. Tricarico, record at pp. 103-104 and Appendix at p. B-21 and Affidavit of Lewis S. Quinn, Record pp. 134-136 and Appendix p. B-22); (3) a certified copy of the Preemption Order was filed into the LPSC's record of the hearings on South Central Bell's application for tariff revisions (*see* transcript of the June 3, 1983 hearing below, p. 78, Appendix p. B-20); and (4) a copy of the Preemption Order was published in the *Federal Register* on January 19, 1983. Under the Administrative Procedure Act, a rule is enforceable once it is published in the *Federal Register*. 5 U.S.C. §552(a)(1). Furthermore, the regulations of the FCC specifically provide that an order may be relied upon, used or cited as precedent once it has been published in the *Federal Register* or the person against whom it is used has actual knowledge of the order. 47 C.F.R. §0.455(e).

Therefore, the Preemption Order was "duly served" upon the LPSC.

As the final portion of its attack upon South Central Bell's invocation of §401(b), the LPSC asserts that the Preemption Order is not an "order" within the meaning of §401(b). This argument is based upon the one federal decision which so holds, *New England Tel. & Tel. Co. v. Public Utilities Com'n of Maine,* 742 F.2d 1 (1st Cir. 1984), *petition for cert. pending,* No. 84-900 (U.S.). However, this conclusion is contrary to those of all other federal courts which have considered this matter. Indeed, the only court to which the FCC Prescription Order was appealed subsequently reviewed on appeal a suit to enforce the Preemption Order and concluded that it was an "order" within the meaning of §401(b). *Chesapeake and Potomac Tel. Co. v. Pub. Serv. Com'n of Md.* at Appendix pp. B-29 through B-30; *accord, South Central Bell Tel. v. Louisiana Pub. Serv. Com'n,* 744 F.2d at 1115-19, Appendix to Jurisdictional Statement at A-14 through A-23; *Pac. N.W. Bell Tel. v. Wash. Util. & Transp. Com'n,* 565 F.Supp. at 21; *Southwestern Bell Telephone v. Ark. Pub. Serv.,* 738 F.2d 901, 908 (8th Cir. 1984), *petition for cert. pending,* No. 84-483 (U.S.). As a review of the Preemption Order itself reveals, there can be no doubt that the FCC ordered all state public utility commissions to follow the prescribed depreciation methodologies and procedures. *See also, Union Springs Tel. v. Ala. Pub. Serv. Com'n,* 437 So.2d 485, 488-90 (Ala. 1983); *Re N.Y. Tel. Co. v. Pub. Serv. Com'n of N.Y.,* 98 A.D. 2d 535 (N.Y. App. Div. 1984); *Re Application of Northwestern Bell Tel. Co.,* 218 Neb. 563 (1984). Moreover, at least two decisions of this Court provide support for interpreting the term "order" in §401(b) to include administrative rules. *See Ambassador, Inc. v. United States,* 325 U.S. 317, 65 S.Ct. 1151 (1945) and *Columbia*

Broadcasting System, Inc. v. United States, 316 U.S. 407, 62 S.Ct. 1194 (1942). Therefore, the Preemption Order was an "order" within the meaning of §401(b).

The LPSC's assertion that §401(b) does not provide a remedy to a private party against a state public utilities commission also runs contrary to §401(b) jurisprudence unrelated to the Preemption Order. For example, in *Illinois Bell Telephone Co. v. Ill. Commerce Com'n*, 740 F.2d 566 (7th Cir. 1984), the petitioner was granted an injunction against the defendant public utilities commission requiring it to comply with FCC-mandated accounting practices.

It is also instructive to compare §401(b) with its predecessor provision, 49 U.S.C. §16(12) (reproduced at Appendix p. B-54).[2] Section 16(12) expressly restricts the injunctions which it authorizes to those against carriers. While the LPSC argues that §401(b) should be construed so as to provide a similar result, it is conspicuous that §401(b) is not restricted in its scope to actions against carriers, as is its predecessor statute, §16(12). Indeed, it can be implied that Congress intentionally expanded the class of defendants against whom injunctions could issue under §401(b). Nothing in the language of §401 indicates that a private party is precluded from obtaining an injuncction under subsection (b) once the statutory prerequisites have been satisfied. Because the statutory language and clear weight of authority indicate that such a remedy is expressly provided, no substantial question exists which merits the argument of this case before the Court.

---

[2] When the Communications Act was drafted, 49 U.S.C. §16(12) was the provision on which §401(b) was modeled. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 9 (1934) and H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934).

B. *The district court below did not abuse its discretion in granting and subsequently modifying the preliminary injunction*

The second major portion of the LPSC's Jurisdictional Statement argues that the district court exceeded its authority by issuing and later modifying the preliminary injunction. As discussed above, South Central Bell clearly established that the requirements of §401(b) had been met, *i.e.*, that (1) the Preemption Order is an FCC "order" within the meaning of §401(b), (2) the Preemption Order was regularly made and duly served upon the LPSC, (3) the LPSC was in disobedience of the order, and (4) South Central Bell had been injured by the LPSC's disobedience. 744 F.2d at 1114-1120, Appendix to Jurisdictional Statement, pp. A-13 through A-26. As was recognized by both courts below, when an injunction is expressly authorized by statute and the statutory conditions are satisfied, the injunction shall issue. *United States v. City and County of San Francisco*, 310 U.S. 16, 30-31, 60 S.Ct. 749, 757 (1940); *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 273-74, 46 S.Ct. 263, 264-65 (1926); *Matter of Chicago, Milwaukee, St. Paul & P. R. Co.*, 738 F.2d 209, 212-213 (7th Cir. 1984); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 868-69 (9th Cir.), *cert. denied*, __ U.S. __, 104 S.Ct. 149 (1983); *Atchison, T. & S. F. Ry. Co. v. Lennan*, 640 F.2d 255, 259-60 (10th Cir. 1981). Accordingly, the district court did not abuse its discretion in issuing the preliminary injunction requiring the LPSC to implement the FCC-mandated depreciation policies and procedures once it found that the §401(b) prerequisites had been met.

The LPSC next argues that the district court exceeded its authority by modifying its preliminary injunction so as to require it to allow South Central Bell to recover the

$40,506,000 in increased expenses which the LPSC itself found to result from implementation of the FCC-mandated procedures and methodologies. Both the district and circuit courts found as a matter of fact that the LPSC had acted arbitrarily and capriciously by reducing South Central Bell's fair rate of return from 13.5% to 12% for the sole purpose of appearing to recognize South Central Bell's increased expenses without having to order a corresponding increase in rates. 744 F.2d at 1120-22, Appendix to Jurisdictional Statement at A-27 to A-30; 570 F.Supp. at 237-238, Appendix to Jurisdictional Statement at A-53 to A-56.

The district court noted that the LPSC, in its order issued in response to the preliminary injunction on July 7, 1983, expressly found that the amount of increased expenses resulting from compliance with the Preemption Order was $40,506,000. 570 F.Supp. at 237-238, Appendix to Jurisdictional Statement at A-54 to A-56; *see also*, Appendix to Jurisdictional Statement pp. A-102 through A-107. The district court consistently refused to engage in the setting of rates within the intrastate jurisdiction. However, noting that no evidence had been received by the LPSC since the issuance of the preliminary injunction, the court found that the LPSC had no justification for failing to order an increase in revenues sufficient to match the increased operating costs resulting from compliance with the Preemption Order. 570 F.Supp. at 237, Appendix to Jurisdictional Statement at A-55. Therefore, in order to enforce compliance with the Preemption Order and with the terms of its preliminary injunction, the court modified that injunction so as to require the LPSC to permit South Central Bell to recover the $40,506,000 in increased expenses calculated by the LPSC.

There is no doubt that a district court has continuing jurisdiction over its preliminary injunction. *Canal Authority of State of Florida v. Callaway,* 489 F.2d 567, 578 (5th Cir. 1974). Great deference is given to the interpretation placed on the terms of an injunctive order by the district court which issued and must enforce it. *Alabama Nursing Home Ass'n v. Harris,* 617 F.2d 385, 388 (5th Cir. 1980), *citing Sierra Club v. Callaway,* 499 F.2d 982, 991 (5th Cir. 1974). As stated previously in the discussion of the scope of review, a preliminary injunction is reviewable only for an abuse of discretion by the trial court. In light of the circumstances under which the LPSC refused to permit the recovery of all the expenses resulting from compliance with the Preemption Order, the trial court was well within its discretion to modify the preliminary injunction as it did.

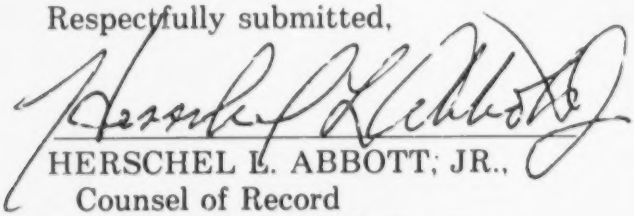
On appeal, the Fifth Circuit affirmed the modification of the preliminary injunction on grounds other than those relied upon by the district court. Specifically, the Fifth Circuit noted that the Communications Act imposed no restrictions upon the Court's authority to enforce an FCC order. The Court of Appeals found it clear that the trial court's power to enjoin was co-extensive with the reach of the FCC order being enforced. Since the validity of the Preemption Order was presumed on this appeal, and since the injunction was found necessary to the enforcement of that Order, the Fifth Circuit affirmed the modification of the injunction as it had already concluded that the LPSC violated the Preemption Order "by manipulating the rate of return for the sole purpose of avoiding high telephone rates." 744 F.2d at 1122-23, Appendix to Jurisdictional Statement at A-32 through A-33. This conclusion comports with the broad injunctive powers held by a court when enforcing preemptive statutes and orders. *Capital Service v. National Labor Relations Board,* 347

U.S. 501, 504, 74 S.Ct. 699, 702 (1954); *Public Utilities Com. v. United Fuel Gas Co.*, 317 U.S. 456, 468, 63 S.Ct. 369, 376 (1943); *Cabot Corporation v. Public Service Com'n of W. Va.*, 332 F.Supp. 370, 373 (S.D. W. Va. 1971).

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or, in the alternative, affirmed.

Respectfully submitted,



HERSCHEL L. ABBOTT, JR.,
Counsel of Record
JAMES P. BROWNING, JR.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
225 Baronne Street, 18th Floor
New Orleans, Louisiana 70118
Telephone: (504) 581-6641

M. ROBERT SUTHERLAND
CHARLES G. RIVET
Room 1870, 365 Canal Street
New Orleans, Louisiana 70140
Telephone: (504) 528-2050

Counsel for Appellee, South Central
Bell Telephone Company

APPENDIX "A"

FEDERAL COMMUNICATIONS COMMISSION ORDER

FCC 82-576
32528

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended for:

American Telephone and Telegraph Company, Long Lines Department; The Chesapeake and Potomac Telephone Company; The Chesapeake and Potomac Telephone Company of Maryland; The Chesapeake and Potomac Telephone Company of Virginia; The Chesapeake and Potomac Telephone Company of W. Virginia; Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; South Central Bell Telephone Company; Southern Bell Telephone and Telegraph Company; The Southern New England Telephone Company; Wisconsin Telephone Company

ORDER

Adopted December 22, 1982; Released December 30, 1982 by the Commission:

I. INTRODUCTION

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of the classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed.

2. By this order we prescribe revised percentages of depreciation (depreciation rates) for the eleven Bell Operating Telephone Companies (BOTC's) listed above using the straight-line equal life group (SLELG) method.

II. BACKGROUND

A. *Straight Line Equal Life Group Method*

3. In FCC Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), we amended our rules to permit the use of the SLELG depreciation method for new additions to plant as an alternative to the straight line vintage group (SLVG) method, provided that adequate data is available for the proper application of the method.

4. The primary differences between the SLELG and SLVG methods lie in the definition of the basic depreciation groups and in the approach each takes in spreading the original cost of assets comprising the basic groups over their estimated average service lives. While SLVG forms its basic groups by combining all units placed in one year (i.e., a vintage group), SLELG creates its basic groups by combining all units within each vintage group which share

an equal life expectancy (i.e., an equal life group). While the SLVG method is designed to depreciate 100% of the original cost of a vintage on average over the life cycle of each vintage, the SLELG method is designed to depreciate 100% of the original cost of each plant unit over its life. As a consequence, if projections are accurate, the SLELG method should allow for depreciation at a rate more representative of the actual consumption of units of property than SLVG. We concluded in Docket No. 20188 that the proper application and monitoring of this method would not only enhance the carriers' cash flow and present to all interested parties a more accurate and objective financial picture of the carriers' operations and capital requirements, but would also benefit their customers by encouraging innovation and the introduction of new technology.

5. Under both the SLVG and SLELG methods, retirement projections, service life estimates, and depreciation rates are normally determined, in part, through the use of survivor curves. These survivor curves define the relationship between the age of plant investment and the relative percentage expected to remain in service. Under the SLELG methodology, the survivor curves assume an added significance—that of defining the basic (equal life) groups. Under the SLVG method, most survivor curves have been selected only after the staff has completed detailed statistical analysis of historical retirement data. With the added significance of the survivor curves in the SLELG method, the availability and analysis of historical retirement data becomes even more important.

6. We recognized the importance of adequate data in Docket No. 20188 where we found that the SLELG method is acceptable, provided that:

> "... it is assured that adequate data is available for proper application of the method; that record keeping and reporting practices will enable monitoring of the reasonableness of the rate of allocation of both original cost and provisions for salvage and removal; that such allocation of original cost will achieve allocation over the service life of the property neither more nor less than 100% of the investment net of salvage value."

Accordingly, we directed the staff to take such measures as may be necessary to insure the measurability and accountability of the results under the SLELG method.

7. We further directed the staff to phase in the implementation of SLELG depreciation rates beginning with the outside plant accounts, followed by the central office equipment accounts and concluding with all other plant accounts. In accordance with this directive, this year the staff reviewed SLELG rates for the outside plant accounts for all of the BOTC's. As a result of that review, we adopted SLELG rates for new additions to most of the outside plant accounts for fifteen of these companies in July (*see* FCC 82-353, 90 FCC 2d 964 (1982)) and for nine additional companies in December (*see* FCC 82-542, Mimeo No. 32468). Our findings and conclusions regarding the SLELG rates for AT&T Long Lines' outside plant accounts are discussed below (see paragraph 26 ff). With the adoption of this order, the prescription of SLELG rates for the outside plant accounts is complete for the Bell System.

8. This year the staff also reviewed SLELG rates for the central office equipment accounts for most of the BOTC's. As a result of that review, we adopted SLELG rates for new additions to most of the central office equipment accounts for nine of these companies in December

(*see* FCC 82-542, Mimeo No. 32468). Our findings and conclusions regarding the SLELG rates for ten of the eleven BOTC's listed in the caption of this proceeding are discussed below (see paragraph 26 ff).[1] With the adoption of this order, the prescription of SLELG rates for the central office equipment accounts is complete for the BOTC's which have requested such rates.

B. *Review Procedures*

9. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger FCC-subject telephone companies each year. In most cases we have prescribed rates for a carrier only after the following actions have been completed:

(1) Submittal of depreciation studies by the carrier.

(2) Staff review of the carrier's filings and studies in support of its proposed life and salvage factors.

(3) Independent staff analysis of such information as the carrier's plant mortality data and equipment retirement plans.

(4) Preparation of preliminary staff recommendations.

(5) Discussion of the carrier's filings and the preliminary Commission staff proposals at a conference in which representatives of the carrier and the staffs of the respective state commissions and the FCC participate (i.e., a three-way meeting).

---

[1] AT&T Long Lines is scheduled for a complete review of depreciation rates in 1983; as a result, it did not file for SLELG rates for central office equipment this year.

10. During the past year, in addition to the filings in conjunction with the staff's normal triennial represcription cycle, we received SLELG proposals from the BOTC's listed in the caption of this proceeding. The need to resolve the issues raised by these filings in a timely manner required the staff to depart from its traditional procedures. Because it was apparent that there were insufficient staff resources to allow the complete review of life and salvage factors for the carriers requesting SLELG rates, the staff chose to omit portions of steps 2 and 3 above and instead use the life and salvage factors which underlie currently prescribed rates. In addition, time and resource constraints precluded the discussion of SLELG rates with the carriers and respective state commissions at three-way meetings. Instead, comments regarding the carrier filings and preliminary staff proposals were solicited from the carriers and respective state commissions via correspondence and telephone conversations.

11. On August 13, 1982, the staff sent review letters to the BOTC's and the respective state commissions outlining its assessment of the BOTC's SLELG studies and its own recommendations for SLELG rates. Subsequently, in September the BOTC's formally filed for SLELG rates for the central office equipment accounts. At that time, six BOTC's whose depreciation rates are scheduled for review in 1983 notified the staff of their intention not to file for SLELG rates for central office equipment. The staff analyzed the BOTC filings and arrived at its recommendations and, on October 12, 1982, issued a public notice (Report No. 2969) entitled, "Depreciation Rate Prescriptions Proposed For Domestic Telephone Companies." This public notice summarized the FCC staff's proposals for revised depreciation rates and the change in depreciation expense that would result if those proposed depreciation

rates were approved. On October 13, 1982, the staff transmitted to each company and respective state commission a copy of the October 12 public notice, schedules containing the proposed SLELG rates and the staff analysis underlying the proposed SLELG depreciation rates.

III. SUMMARY OF COMMENTS

A. *August 13, 1982 Review Letters*

12. Responses to the staff's August 13, 1982, review letters were received from AT&T, each of the BOTC's whose rates are under consideration here, and two of the BOTC's who decided not to file for SLELG rates this year. In addition the following state commissions responded: Indiana, Iowa, Kentucky, Louisiana, Maryland, Mississippi, North Dakota, South Carolina and Virginia.

13. AT&T, the BOTC's, and the Indiana and Mississippi commissions were in substantial agreement with the FCC staff position that SLELG rates should be used. On the other hand, the Iowa, Kentucky, Louisiana, Maryland, and Virginia commissions were opposed to the use of SLELG rates. The North Dakota and South Carolina commissions did not state whether they supported or opposed the use of SLELG rates.

14. AT&T, the BOTC's and the Indiana Commission agreed with most of the SLELG rates proposed by the FCC staff; however, they disagreed with the FCC staff position that SLELG treatment should not be allowed for the COE-Step-by-Step and COE-Crossbar accounts on the grounds that they are "dying" accounts that will be almost fully retired within a few years. AT&T stated that, although these are "dying" accounts, significant investment will be

added to these accounts over the next several years and that remaining-life rates would provide first year accruals of only one-half those provided by SLELG rates. AT&T also asserted that its detailed retirement plans for these accounts provide a sound basis on which to determine SLELG depreciation rates. Additionally, it stated that the FCC, in approving the SLELG method, left room for judgment as to what constitutes adequate data, and that, in the exercise of this judgment, weight should be given to the Commission's decision that SLELG is a preferred method. AT&T also contended that the use of the SLELG method in "dying" accounts is important in that it helps prevent the deferral of capital recovery beyond the physical life of the property. AT&T also stated that the FCC staff's proposals regarding future net salvage and interim retirement patterns warrant further investigation. Finally, AT&T stated that the life estimates underlying currently prescribed rates for COE-ESS are too long.

15. The Mississippi Commission also generally agreed with the use of SLELG rates; however, it stated that additional information would have to be reviewed before it could form an opinion as to the appropriateness of the staff's proposed curve shape for COE-Electronic.

16. The Kentucky Commission stated that it does not believe the use of SLELG is necessary in order to provide adequate capital recovery. It stated that the use of the remaining-life technique will allow proper recovery, but that, if SLELG rates are to be used, the rates proposed by the FCC staff are appropriate. The staff of the Kentucky Commission also endorsed the FCC staff's proposal to continue to use the remaining-life method for the COE-Step-by-Step and COE-Crossbar accounts. It stated that retirement dispersion patterns for these "dying" accounts could

not be determined for new additions in these subaccounts, and that, therefore, SLELG rates could not be properly implemented.

17. The Iowa Commission had no comments regarding the proposed changes in depreciation rates for Northwestern Bell Telephone Company's interstate operations; however, it stated that it would retain exclusive jurisdiction over the establishment of depreciation practices for the intrastate operations of Northwestern Bell Telephone Company and that it, therefore, did not concur in such changes for the intrastate plant in Iowa. The Louisiana Commission stated that it has not authorized South Central Bell to use the SLELG method for intrastate ratemaking purposes. The Maryland Commission contended that the benefits associated with the SLELG procedure are illusory because estimated service lives will always be inaccurate and, therefore, proper matching of capital consumption and recovery will not occur. It also claimed that SLELG depreciation methods have not been shown to be superior to the SLVG procedure. The Virginia Commission reiterated its comments made in response to an earlier public notice; i.e., that SLELG is neither necessary nor in the best interests of Virginia telephone companies or customers.

18. The North Dakota Commission stated that it believed Northwestern Bell would not file for SLELG rates for central office equipment until 1983, and that it would reserve comment until the filing.

19. The South Carolina Commission stated that it was concerned about several assumptions made by the staff as well as the underlying methodologies the staff used. It requested that the FCC postpone consideration of the

implementation of SLELG for central office equipment in South Carolina until after the scheduled three-way meeting in 1983. It stated that the three-way meeting is the appropriate forum for a complete enunciation of all its concerns and alternative proposals.

B. *October 12, 1982 Public Notice*

20. Responses to the staff's October 12, 1982 public notice were received from AT&T and the staffs of the Louisiana, Maryland and Virginia commissions.

21. AT&T and the Maryland and Virginia commissions reiterated their earlier comments in response to the staff's August review letters (see paragraphs 14 and 17). AT&T again stated that it supports the staff's proposals with the exception of the denial of SLELG treatment for the COE-Step-by-Step and COE-Crossbar accounts. Virginia expressed the concern that its comments with regard to AT&T's SLELG filings for outside plant were dismissed without sufficient consideration in FCC Order 82-353, *supra*. The Virginia Commission also questioned why our staff requested comments when we have already stated that the question of whether or not the SLELG method should be used was decided in Docket No. 20188.

22. AT&T Long Lines stated that it did not request SLELG treatment for accounts in which it did not maintain vintage retirement data. In addition, it agreed with the rates proposed by the staff in the October 12, 1982 public notice.

DISCUSSION OF ISSUES

A. *Use of SLELG*

23. In our decision in Docket No. 20188, we considered the arguments expressed by the parties for and against the use of the SLELG method and determined that the use of SLELG rates is appropriate, provided adequate data is available. In the discussion in the Final Report and Order, we found that the use of SLELG comports with the mandate of Section 1 of the Communications Act, "to make available...a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges..." 47 U.S.C. §151. We reaffirmed our decision allowing the use of SLELG in our Order on Reconsideration as well as in five prescription orders approved this year (viz., FCC 82-53, 88 FCC 2d 1567 (1982), FCC 82-353, *supra*, FCC 82-354, 90 FCC 2d 997 (1982), FCC 82-542, Mimeo No. 32468, and FCC 82-543, Mimeo No. 32469). Nevertheless, several states have again questioned whether the use of SLELG rates is warranted. Inasmuch as these states have not raised any new arguments or evidence regarding the use of SLELG rates, we have no basis to reverse our decision on this matter. Our rules, as amended in Docket No. 20188, clearly allow the use of SLELG for accounts in which adequate data is available to properly apply and monitor it. Therefore, we will allow its use.

24. Although the Virginia Commission is correct that the issue of whether or not the SLELG method may be used has already been decided, this does not mean it was meaningless to solicit comments. The primary purpose of the October 12, 1982, public notice was not to bring into question our rules, which clearly allow the use of the

SLELG method, but rather to solicit comments regarding the effective dates proposed by the carriers and the life and net salvage factors that were under consideration for use in determining SLELG rates. Virginia did not respond to these issues. However, several respondents did and their comments are considered in this order (see paragraphs 26-28).

B. *Preemption of States*

25. Several state commissions stated that they have not approved SLELG procedures for their jurisdictions. The presence or absence of state commission approval of SLELG rates does not control the prescription of SLELG rates in this order. The prescription of depreciation rates is plainly a matter within the Commission's jurisdiction under Section 220(b) of the Communications Act. We have today ruled that such depreciation orders are binding at both the federal and state levels. *See* Amendment of part 31, FCC 82- , Mimeo No. (adopted December 22, 1982).

C. *Life and Net Salvage Factors*

26. Our staff has stated that SLELG rates should be based upon the life and salvage factors determined in conjunction with the staff's last complete review of these companies' rates, because these companies are not scheduled for a complete review of depreciation rates until 1983 or 1984, and staff resources did not permit a complete review of life and salvage factors this year. In the October 12, 1982 public notice, the staff clearly stated its preference for the use of current life and salvage factors, and there were no comments to the contrary in response to that public notice. Furthermore, the BOTC's agreed with the staff and filed

for SLELG rates based upon the factors determined in the last complete depreciation rate review. In this instance, we find that the benefits derived from implementing the new methods in a timely manner outweigh any advantages that may be derived from improving the precision of the estimates through the preparation and review of new studies of life and salvage. Furthermore, any inaccuracies that may result will be identified and resolved in the regularly scheduled reviews in 1983 and 1984.

27. The South Carolina Commission contended that SLELG rates should not be prescribed until it has had an opportunity to discuss the rates at a three-way meeting. We agree with South Carolina that it would be preferable to prescribe rates only after all the steps outlined in paragraph 9 are completed; however, we believe that the completion of all the steps outlined in that paragraph would have resulted in an unacceptable delay in the implementation of SLELG rates. We, therefore, believe the staff's departure from the traditional review procedures (i.e., especially the decision not to hold three-way conferences) was justified. Furthermore, we find that, with the staff review letters having been sent to the carriers and respective state commissions in August and with the public notice having been issued in October, South Carolina and all other parties had a reasonable opportunity to review the company and FCC staff proposals and submit their views for our consideration.

28. In FCC 82-353, *supra*, we pointed out that, when there is a strong relationship between the age of retirements and net salvage, future net salvage estimates for embedded plant do not apply to future additions of plant. In the companies' most recent depreciation studies for the COE-Circuit and COE-Radio accounts, net salvage percentages and

the age of retirements were demonstrated to be highly correlated. As a result, the future net salvage estimates used in determining the remaining-life rates for embedded plant are not appropriate for use in determining SLELG rates for new additions to plant. The staff analyzed these accounts and made the necessary adjustments to convert future net salvage factors originally derived for embedded plant to future net salvage factors for use with new additions to plant. The proposed adjustments were provided to the carriers and state commissions in October, and no responses objecting to these proposals were received. Therefore, we support the staff's proposals for SLELG future net salvage percentages in these accounts.

D. *Accounts for which SLELG Rates are not Recommended*

29. In our final decisions in Docket No. 20188, we found that the SLELG method is acceptable if adequate data is available for the proper application of the method and if the carriers' record keeping practices will allow for the monitoring of the reasonableness of the rates. In each of the SLELG prescription orders approved to date, we have concluded that vintage retirement data is a minimum requirement for the proper application and monitoring of SLELG rates. In this proceeding, AT&T commented that it believes SLELG rates should be allowed for all accounts regardless of whether vintage retirement data is maintained; however, it offered no new argument or evidence to support this contention. There is, therefore, no basis on which to rescind the reporting requirements established in Docket No. 20188. We conclude that it is inappropriate to prescribe SLELG rates for accounts in which vintage retirement data is not maintained.

30. The staff proposes that new additions to the COE-Step-by-Step and COE-Crossbar accounts not be depreciated using the SLELG method. The staff argues that it is impractical to determine reasonable future survivor curves for these additions because these accounts consist of classes of equipment which are being rapidly retired from service. The staff proposes that new additions, as well as embedded plant, in these accounts be depreciated using the remaining-life method, and asserts that the remaining-life method will assure timely and complete recovery of capital. AT&T disagreed and argued that the objectives of the FCC, as stated in our decision in Docket No. 20188, would be frustrated by not applying SLELG rates to these accounts.

31. Both the FCC staff and the Kentucky Commission stated that estimated survivor curves for COE-Step-by-Step and COE-Crossbar have *not* been determined in previous depreciation studies and that it is impractical to do so at this time. This is because it has not been demonstrated that the companies can accurately estimate future additions or retirements for individual switching units. With the majority of remaining lives for electromechanical equipment in the three to seven year range, the error of these estimates will likely be significant. New additions to these accounts will clearly have very short and volatile estimated remaining lives, making the development of reliable survivor curves virtually impossible. Without reliable survivor curves, the development of an SLELG depreciation rate is illusory. This is because the remaining life "corrections" and curve shape changes would rapidly alter the overall depreciation rate for the account. We previously stated that SLELG rates should be used if adequate data exists to properly apply the method. Inasmuch as the future survivor curves cannot be practically

determined, we agree with the staff that the proper application of the method cannot be accomplished for these accounts.

32. Additionally, as noted by AT&T, the current Bell System investment in the electromechanical accounts is approximately $13 billion, virtually all of which will be retired over the next ten years. The current annual additions to central office equipment are nearly $7 billion. In this context we find that the $600 million being added annually to the electromechanical accounts, which consists largely of reused (i.e., previously installed) equipment and associated labor, is not significant.

33. AT&T is probably correct that the current remaining-life rates may be only one-half the first year SLELG rates. However, an examination of this by the staff revealed that, if remaining lives were updated annually, the resultant remaining-life rates would be comparable to the first year SLELG rates for COE-Step-by-Step and would average one-third lower for COE-Crossbar. In most cases remaining-life rates are *higher* than SLELG rates by the end of the second year. Considering the aforementioned volatility of the life and curve shape estimates underlying the SLELG method, we find that the additional accruals provided by the SLELG method are insignificant even over the first two years of application.

34. We do not agree with AT&T that the use of the remaining-life method risks any deferral of capital recovery beyond the remaining-lives of the assets. Remaining-life rates are designed to completely depreciate invested capital over the remaining life of a group of assets. This feature was the primary reason that we changed our rules in Docket No. 20188 to allow the use of the remaining-life

method. We concur with the staff's reasoning and find that the remaining-life method should be used for depreciation of the COE-Step-by-Step and COE-Crossbar accounts.

35. While we agree with the staff's reasoning on the use of the remaining-life method for the electromechanical accounts, we also believe that some special measure is required to assure full and timely capital recovery on these short remaining life assets. We, therefore, direct the staff to update remaining-life depreciation rates for these accounts on an annual basis as requested by the companies or as is deemed necessary by the staff. These updates will assure that capital recovery is not unnecessarily deferred.

E. *Original Cost and Net Salvage Rates for ELG*

36. We are only prescribing SLELG rates for the original cost of investment for the first four years of new additions to most central office and outside plant accounts. These rates will be applied until the next triennial review of depreciation for these companies. At that time the actual results of the use of the SLELG method will be evaluated, and methods and rates will be modified as necessary.

37. Present carrier accounting practices do not allow carriers to accumulate net salvage data by vintage for all classes of plant. For example, retirement of a complete bay of central office equipment may involve removal of equipment of several vintages, but would normally result in a single aggregate cost of removal and salvage. In this situation it is not feasible to allocate that cost of removal or salvage among the vintages in a meaningful manner. For this reason, instead of prescribing net salvage depreciation rates for each vintage, we are prescribing a single net salvage depreciation rate which is to be applied to all new

vintages until the next regular review. *See* FCC 82-53, FCC 82-353, and FCC 82-354.

F. *Conclusion*

38. Having considered the responses to the staff's review letters and public notice, the recommendations of the staff, and the proposals of the companies, we find the resulting SLELG rates listed in the Appendix to be appropriate rates to be applied, unless modified by further order of this Commission.

V. ORDERING CLAUSE

39. Pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 220(b), IT IS ORDERED, That the percentages of depreciation set forth in the Appendix to this order are prescribed effective on the dates listed.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico, Secretary

Attachment: Appendix*

* Only that portion of the Appendix relating to South Central Bell's depreciation rates in Louisiana is included.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
SOUTH CENTRAL BELL TELEPHONE COMPANY—
LOUISIANA

Acct.	Class or Subclass of Plant (a)	Year (b)*	Proj. Life (c) (Yrs.)	Fut. Net Salv. (d) (%)	Original Cost Rates Age at Begin. of Year 0.0 (e) (%)	0.5 (f) (%)	1.5 (g) (%)	2.5 (h) (%)	Net Salv. Rate (i=-d/c) (%)
221	Central Office Equipment								
	Non-Ded. Circuit	1983	15.6	-5	13.3	10.5	9.1	8.3	0.3
	DDS Circuit	1983	11.6	-4	15.1	13.0	11.6	10.6	0.3
	Radio	1983	21	-5	7.3	6.9	6.6	6.3	0.2
	Electronic	1983	21	1	8.3	7.0	6.3	6.0	0

*ELG rates are effective January 1 of the year shown in column b and are to be applied to plant additions for that year and subsequent years.

APPENDIX "B"

TESTIMONY AND EVIDENCE FROM PROCEEDINGS BELOW

EXCERPT FROM TRANSCRIPT OF HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Friday, June 3, 1983, p. 78

CROSS-EXAMINATION

BY MR. ABBOTT:

Q. Mr. Louiselle, in addition to the prefiled testimony which you gave in the 1982 rate case, you also were cross-examined in connection with that case, were you not?

A. That's correct.

Q. And during that cross-examination, a certified copy of the order of January 6, 1983, of the Federal Communications Commission was introduced into evidence before the Commission, was it not?

A. Yes, it was.

Q. And you were cross-examined on that?

A. Yes.

Q. And that was on or about January 17-18, 1983?

A. Yes.

Q. Approximately 12 days after the Federal Communications Commission issued the January 6 order?

A. Yes, assuming they issued it on the date appearing thereon.

DECLARATION

I, William J. Tricarico, declare as follows:

1. I am the Secretary of the Federal Communications Commission, in Washington, D.C. and have held that position since 1977. In that capacity I am responsible for maintaining the records in all Commission docketed proceedings. One of my duties is to ensure that Commission orders, decisions and other documents are served upon interested parties pursuant to regulatory and statutory requirements.

2. The document which I understand is the subject of this lawsuit—the order released on January 6, 1983, in CC Docket No. 79-105—contained a clause directing me to serve a copy of the order on each state commission. At the time the order was released, I delegated this function to the dockets branch of my office. Subsequently—on June 6 and 7, 1983—I checked with the responsible clerk in the dockets office. She told me that she had prepared copies of the order for mailing and that copies were mailed by employees in the Commission's mail room to all state public service commissions, including the Louisiana Public Service Commission, on or about January 7, 1983.

3. There is no statutory or regulatory requirement of which I am aware requiring any particular form of service upon state commissions. In this case the Commission served the order by regular mail. This is normal Commission practice and I do not know of any case in which the Commission has ever served a state public utility commission in any other way.

I declare under penalty of perjury that the foregoing

is true and correct, based on my knowledge and information.

Executed on June 7, 1983.

/s/ William J. Tricarico
WILLIAM J. TRICARICO

AFFIDAVIT

BEFORE ME, a notary public in and for the parish of Orleans, state of Louisiana, personally came and appeared:

LEWIS S. QUINN

who, deemed by me first duly sworn, did depose and say:

1. I am Secretary of the Louisiana Public Service Commission. I ordinarily receive service of process for the Commission, which is personally delivered pursuant to the provisions of Louisiana law to me at the office of the Commission, Suite 1630, One American Place, Baton Rouge, Louisiana. I also receive many of the mailings directed to the Commission by other regulatory agencies, including federal agencies.

2. The Commission receives hundreds of mailings annually from other regulatory agencies. These include mailings from the Federal Communications Commission ("FCC"). Orders, notices, publications, bulletins and other documents are apparently mailed routinely to state regulatory agencies. When received, this material is routinely routed by me to employees of the Commission or to the appropriate files. No action is taken upon receipt of

routine mailings in the absence of a reason to believe the Commission is specially affected by the transmitted material.

3. I have no recollection of receiving in the mail from the FCC the order that is relied on by the plaintiff, South Central Bell Telephone Co. ("South Central Bell"), in this case. Upon review of the files of the Commission, I learned that a copy of the order was received in the mail. However, this document apparently was not seen or reviewed by me, because it bears no marks indicating that I received it and routed it to an employee or to a file. The order may have been received and routed to an employee of the Commission as a matter of routine practice. The mailing contained no notice, letter of explanation, statement, directive or any other special notification that the Commission had been ordered by the FCC to take any action. The Commission does not make it a practice to routinely review the voluminous material published by the FCC to determine whether, by operation of law, the Commission might be required to change its practices as a result of these publications.

4. Traditionally, the depreciation rates of South Central Bell in Louisiana have been established in three-way meetings involving the Commission, the FCC and South Central Bell. These meetings occur each three years. In September, 1981, three-way meetings occurred in Biloxi, Mississippi, at which time a three year agreement was reached. At that time, all parties were aware of the methodologies employed by the Commission; depreciation lives were established to be used with these methodologies. The FCC did not object to the use of these methodologies by the Louisiana Commission, though it was noted that South Central Bell might apply for changes in the

methodologies. The FCC has never formally notified the Commission of its decision to rescind and abrogate the practices contemplated in the 1981 agreement, except insofar as this abrogation might be read into its order issued in January, 1983.

/s/ Lewis S. Quinn

Sworn to and subscribed before me
this ____ day of June, 1983.

_____
Notary Public

APPENDIX "C"

RECENT RELEVANT AND/OR UNPUBLISHED DECISIONS

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

83-1403

The Chesapeake and Potomac
Telephone Company of Maryland,

Appellee,

vs.

Public Service Commission of Maryland,
Frank O. Heintz, Chairman,
William A. Badger, Commissioner,
Lilo K. Schifter, Commissioner,
Wayne B. Hamilton, Commissioner,
Haskell N. Arnold, Commissioner

Appellants

and

Ronald Hawks, Executive Director and
Maryland Office of People's Counsel,

Defendants

Federal Communications Commission,

Amicus Curiae

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Senior District Judge. (C/A N-83-855)

Argued: December 9, 1983 Decided November 20, 1984

Before RUSSELL and MURNAGHAN, Circuit Judges and MICHAEL,* District Judge

---

Kirk J. Emge, General Counsel for the Public Service Commission of Maryland (Sandra L. Hall, Assistant General Counsel on brief) for Appellants; D. Michael Stroud (Robert A. Levetown and Mark J. Mathis; David H. Lloyd, John A. Siliciano, Daniel I. Prywes, Arnold & Porter; J. William Sarver on brief) for Appellee.

PER CURIAM:

This is an appeal from an Order of the District Court granting a preliminary injunction requiring the Public Service Commission of Maryland (PSC) and its officials to comply with a Federal Communications Commission (FCC) Preemption Order dated January 6, 1983. Jurisdiction for this appeal is provided for in 28 U.S.C. §1292(a)(1) (1982).

PSC argues on appeal that the District Court had no jurisdiction to grant the preliminary injunction, or alternatively that the District Court abused its discretion in granting the preliminary injunction. Prior to addressing those arguments, it is important to discuss briefly the FCC Preemption Order underlying this appeal.

The Preemption Order prescribed depreciation rates and depreciation methods for certain equipment used by telephone companies. The FCC initially indicated that the

---

* Hon. James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

Preemption Order did not affect the authority of state utility commissions insofar as intrastate communications service was concerned. 89 F.C.C. 2d 1094, 1108 (1982). Subsequently, the FCC reversed its position, stating that the Preemption Order completely preempted the authority of state utility commissions to regulate depreciation rates and methods for the specified telephone equipment. C.C. Docket No. 79-105, F.C.C. No. 82-581, slip op. (Jan. 6, 1983).

Notwithstanding the FCC's position regarding the Preemption Order, PSC concluded that the FCC-prescribed rates and methods would be inappropriate in establishing intrastate depreciation rates. As a result, PSC decided not to comply with the Preemption Order in establishing depreciation rates sought by the Chesapeake and Potomac Telephone Company of Maryland (C&P).

In response to PSC's decision, C&P brought an action to force PSC to comply with the Preemption Order. As a part of that action, C&P obtained the preliminary injunction at issue here. The preliminary injunction required PSC and its officials to comply with the Preemption Order in establishing both interstate and intrastate depreciation rates and methods. The District Court granted the preliminary injunction until the resolution of *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir. June 18, 1984), an action then pending concerning the validity and effect of the Preemption Order. Although PSC immediately appealed the District Court's decision, we reserved judgment on PSC's appeal until resolution of *Virginia State Corporation Commission v. FCC*, due to the relationship between the two cases.

We subsequently ruled in *Virginia State Corporation Commission v. FCC*, that the Preemption Order was a valid and complete preemption of state regulation regarding interstate and intrastate depreciation rates and methods for the specified telephone equipment. Based on our ruling in that case, we now address PSC's appeal of the District Court's decision granting the preliminary injunction. PSC's appeal consists of two arguments which are considered separately below.

I.

PSC's first argument is that the District Court lacked jurisdiction under 47 U.S.C. §401(b) to grant the preliminary injunction. That provision states:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 U.S.C. §401(b) (1948). There are four points to PSC's argument that the District Court lacked jurisdiction under Section 401(b).

First, PSC argues that the District Court lacked jurisdiction under Section 401(b) because PSC is not a "person" with the meaning of the section. This point is without merit because C&P's suit for preliminary injunction named not only PSC but also the officials comprising PSC as defendants. Thus, even if PSC is not a "person" within the meaning of Section 401(b), PSC's officials are expressly covered by that section.

Moreover, we believe that PSC must be considered a "person" within the meaning of Section 401(b). A contrary interpretation would undermine the Federal Communications Act by rendering PSC and other communications "entities" immune from enforcement actions by the FCC under Section 401(b). Therefore, we conclude that PSC's first point does not support its argument that the District Court lacked jurisdiction in this case.

Second, PSC argues that Section 401(b) did not provide the District Court with jurisdiction because the Preemption Order is not an "order" within the meaning of that section. Section 401(b) expressly covers only violations of FCC "orders". Relying on the distinction between administrative orders and rules stated in *CBS v. United States*, 316 U.S. 407, 418 (1942), PSC asserts that the Preemption Order is merely an administrative rule, and therefore outside the scope of Section 401(b).

Although PSC correctly cites *CBS v. United States* for the proposition that administrative orders and rules are distinguishable, we find that the Preemption Order is an "order" within the meaning of Section 401(b). Indeed, our ruling here is dictated by our analysis of the same Preemption Order in *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir. June 18, 1984).

As noted above, in *Virginia State Corporation Commission v. FCC*, we ruled that the Preemption Order was a valid and complete preemption of state regulation concerning depreciation rates and methods for the specified telephone equipment. That opinion did not explicitly state our jurisdictional basis for reviewing the Preemption Order. Nevertheless, our jurisdiction in that case clearly came from 47 U.S.C. §402 (1982) because that section is the exclusive means by which this court can review orders such as the Preemption Order. Although *CBS v. United States* construed Section 402 to cover certain administrative rules and regulations, the express language of Section 402 only provides for review of FCC "orders". Since *CBS v. United States* was not discussed or mentioned in *Virginia State Corporation Commission v. FCC*, it is clear that our review of the Preemption Order in that case was based on the express language of Section 402. Thus, our analysis in *Virginia State Corporation Commission v. FCC* included an implicit ruling that the Preemption Order was an order, not a rule or regulation.

That implicit ruling dictates our ruling in the present case that the Preemption Order was an "order" within the meaning of Section 401(b). *Contra New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, No. 83-1779 (1st Cir. June 29, 1984). Thus, Section 401(b) did provide the District Court with jurisdiction to grant a preliminary injunction concerning the Preemption Order. As a result, we conclude that PSC's second point provides no support for its argument that the District Court lacked jurisdiction in this case.

Third, PSC argues that Section 401(b) did not provide the District Court with jurisdiction because that section cannot be construed as creating an implied private

cause of action to enforce an FCC ruling. Obviously, this point is based on the assumption that the District Court did not have jurisdiction under Section 401(b) because the Preemption Order was not an "order" within the meaning of Section 401(b). Given our above ruling to the contrary, we conclude that PSC's third point is without merit.

Finally, PSC argues that the Johnson Act, 28 U.S.C. §1342, is a bar to preliminary injunctions such as the one at issue here. The Johnson Act states that:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. §1342 (1942).

Although PSC argues that the Johnson Act is applicable to this case, we note that all the prerequisites for application of the Act were not satisfied here. The District Court's jurisdiction in granting the preliminary injunction

was based on 47 U.S.C. §401(b). As such, Section 1342(1) of the Johnson Act was not satisfied. Since the four prerequisites of the Johnson Act are conjunctive, PSC's failure to demonstrate that Section 1342(1) was met here renders the Johnson Act inapposite to the preliminary injunction in this case. Therefore, PSC's fourth point does not support its argument that the District Court lacked jurisdiction to grant the preliminary injunction.

In sum, there is no support for PSC's first argument. As a result, we rule that the District Court had jurisdiction under 47 U.S.C. §401(b) to grant the preliminary injunction at issue here.

II.

Given our ruling that the District Court had jurisdiction to grant the preliminary injunction, we must address PSC's second argument—that the District Court abused its discretion in granting the preliminary injunction.

In considering whether to grant the preliminary injunction, the District Court applied the standard articulated in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). Accordingly, the District Court examined:

> 1. The likelihood that C&P would be irreparably harmed if the preliminary injunction were not granted;
>
> 2. The likelihood that C&P's customers would be irreparably harmed if the preliminary injunction were granted;
>
> 3. The likelihood that C&P would prevail on the

merits of its action to force PSC to comply with the Preemption Order; and,

4. Whether the public interest would better be served by granting or denying the preliminary injunction.

PSC argues that the District Court's conclusion regarding each of the above factors was flawed in some way, and thus the District Court abused its discretion in granting the preliminary injunction.

First, PSC asserts that the District Court erroneously concluded that C&P would suffer irreparable harm if the preliminary injunction were not granted. PSC does not contest the District Court's finding that not granting the preliminary injunction would cost C&P approximately $44,000 per day in lost revenues (i.e., revenues C&P would be receiving if PSC complied with the FCC-prescribed depreciation rates for intrastate ratemaking). However, PSC argues that C&P's loss would not have been irreparable because the District Court could have fashioned an equitable remedy to compensate C&P in the event that C&P prevailed on the merits.

We believe that the District Court correctly found that C&P's loss would have been irreparable. Maryland law provides no statutory device for recovering such a loss, and as PSC concedes, the loss could not have been offset by charging higher rates in the future. *Public Service Commission v. Baltimore Gas & Electric Co.*, 40 Md. App. 490, 393 A.2d 193 (1978); *Chesapeake & Potomac Telephone Co. of Maryland*, 32 Pub. Util. Rep. 3d (PUR) 470, 475 (Md. PSC 1960). Although PSC proposes a court-made equitable remedy, we note that there is no authority cited supporting

that proposition nor has this court found any such authority. Since ratemaking in Maryland is reserved for the legislature, *Public Service Commission v. Baltimore Gas & Electric Co.*, 273 Md. 357, 329 A.2d 691, 694 (1974), we conclude that PSC's proposition is without merit. As such, we agree with the District Court that C&P would have suffered a substantial irreparable loss if the preliminary injunction had not been granted.

Second, PSC asserts that the District Court underestimated the harm to C&P's customers if the preliminary injunction were granted. PSC suggests that the preliminary injunction would force some customers to terminate their telephone service, but we do not believe such a result was likely. As noted by the District Court, the preliminary injunction resulted in an effective rate increase of one cent per day to C&P's customers. Furthermore, the rate increase was subject to a refund plus interest from C&P in the event that C&P lost on the merits of its case against PSC. Given the small amount of the rate increase and the promised refund by C&P, we rule that the District Court correctly concluded that the loss to C&P's customers was not irreparable and was far outweighed by the substantial and irreparable loss to C&P if the preliminary injunction were not granted.

Third, PSC argues that the District Court incorrectly concluded that C&P was likely to prevail on the merits of its case against PSC. Obviously, the fact that the District Court correctly predicted the result in *Virginia State Corporation Commission v. FCC* seriously undercuts PSC's argument. In addition, however, we believe that the District Court had ample justification when it granted the preliminary injunction to conclude that C&P was likely to succeed on the merits. At that time, among courts which

had considered the same issues as in this case, the majority position favored C&P's success on the merits. *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission,* No. C83-214C (W.D. Wash. March 10, 1983), *appeal docketed* No. 83-3746 (9th Cir. April 7, 1984). *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* No. 83-557-A (M.D. La. June 27, 1983), *aff'd,* No. 83-3494 (5th Cir. Oct. 11, 1984); *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas,* No. 83-4125 (D.Kan. May 16, 1983), *appeal docketed,* No. 84-2296 (10th Cir. Sept. 13, 1984). *Contra, New England Telephone & Telegraph Co. v. Public Utility Commission of Maine,* Civ. No. 83-0166-P (D. Me. June 15, 1983), *aff'd* No. 83-1779 (1st Cir. June 29, 1984). Consequently, we believe that the District Court did not err in concluding that C&P was likely to prevail on the merits.

Finally, PSC asserts that the District Court erred in finding that the public interest would better be served by granting the preliminary injunction. Even if we agreed with PSC's assertion, where the first three *Blackwelder* factors favor granting a preliminary injunction, issuance of the preliminary injunction is proper, notwithstanding a finding that the public interest would better be served by not granting the preliminary injunction. *Id.* at 196. Nevertheless, we believe the District Court correctly found that the public interest would better be served by granting the preliminary injunction. As noted by the District Court, the FCC operates under a Congressional mandate "to make available...to all the people of the United States a rapid, efficient, Nationwide, and world-wide...communications service with adequate facilities at reasonable charges..." 47 U.S.C. §151 (1937). Since the FCC issued the Preemption Order in an effort to accomplish its Congressional

mandate, we do not believe that the District Court erred in concluding that temporarily enforcing the Preemption Order would better serve the public interest. Thus, we dismiss PSC's final argument in support of its position that the District Court abused its discretion in granting the preliminary injunction.

In conclusion, we rule that there is no support for PSC's position that the District Court abused its discretion in granting the preliminary injunction. Given our ruling that the District Court had jurisdiction under 47 U.S.C. §401(b) to grant the preliminary injunction, we hold that the District Court's decision be

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 83-4090

SOUTHWESTERN BELL TELEPHONE CO.,

Plaintiff

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS: RICHARD C. LOUX, JANE T. ROY AND PHILLIP R. DICK,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on for hearing of Plaintiff's Motion for Preliminary Injunction on April 8, 1983. Plaintiff

was represented by Gerald L. Goodell, Lawrence A. Dimmitt and David P. Mudrick. Defendants were represented by Brian J. Moline, Donald A. Low, Jim Flaherty and Rosemary O'Leary. The Court having reviewed the record in this case and heard oral arguments of counsel, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. The FCC is a federal agency established by the Communications Act of 1934, 47 U.S.C. §151, *et seq.*

2. Plaintiff is a Missouri corporation doing business in Kansas as a public utility. It provides both intrastate and interstate service, and is subject to regulation by both the FCC and Defendants.

3. Defendant Commission is a Kansas commission authorized by Kansas law to regulate public utilities doing business in Kansas, and the remaining Defendants are individual commissioners of the Commission.

4. The FCC issued a Memorandum Opinion and Order (Exhibit E to Complaint) in CC docket 79-105, adopted December 22, 1982 and released January 6, 1983. In that Order, the FCC held that FCC-prescribed depreciation policies, methods and rates, including remaining life (RL), preempt and render void inconsistent state depreciation policies, methods and rates. The Order required Defendants to permit implementation of, and to recognize in establishing Plaintiff's intrastate revenue requirement, those policies, methods and rates.

5. The January 6, 1983 FCC Order has been in effect from its release date of January 6, 1983 and still is in effect.

Although it is on appeal, it has not been stayed.

6. The January 6, 1983 FCC Order was regularly made by the FCC and duly served.

7. Defendants' January 11, 1983 Order (Exhibit F to Complaint) rejected the preemption announced in the FCC's January 6, 1983 Order. Defendants accordingly failed and neglected to obey the FCC's Order, and rejected Plaintiff's attempted implementation in Kansas of the FCC-prescribed RL depreciation method and rates. Defendants still are disobeying that Order by refusing to allow implementation of RL.

8. Defendants' January 11, 1983 Order and its March 22, 1983 Order (Exhibit I to Complaint) denied Plaintiff revenue to compensate Plaintiff for the depreciation expense Plaintiff is required by the FCC to incur and reflect on its books.

9. Plaintiff has been and is being injured by Defendants' Orders. Due to those Orders, Plaintiff now is suffering an annual revenue shortfall of approximately $3 million, and irreparable damage of over $57,000 weekly.

10. The requested preliminary injunction can be issued without harm to Defendants or the public. This can be done by ordering Defendants to require Plaintiff to refund revenues collected pursuant to rates implementing RL depreciation in the event the FCC's Preemption Order is reversed on appeal and it is finally held that the FCC-prescribed RL depreciation method and rates are not binding on the states.

11. It is in the public interest to enforce an FCC

Order while it is in effect, and not in the public interest to permit Defendants to disobey an effective FCC Order.

Conclusions of Law

1. The Court has jurisdiction to enforce the FCC's January 6, 1983 Order and issue an injunction, pursuant to 47 U.S.C. §401(b) and 28 U.S.C. §1337.

2. The Johnson Act, 28 U.S.C. §1342, is not a bar to this action.

3. The FCC's January 6, 1983 Order has been in effect since January 6, 1983, and Defendants disobeyed and are disobeying it.

4. Plaintiff has at least a reasonable probability of success on the merits of its Complaint.

5. Without the requested relief, Plaintiff will be irreparably harmed. The public interest can be protected by ordering Defendants to require that increased revenues resulting from implementation of the remaining life depreciation method be collected subject to refund, as described in finding 10, above. Collection of rates subject to refund is adequate security.

6. Plaintiff is entitled to a preliminary injunction, and a preliminary injunction should issue.

DATED this 8th day of April, 1983 at Topeka, Kansas.

/s/ Richard D. Rogers
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-4

WISCONSIN BELL, INC.,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, NESS FLORES, BRANKO TERZIC and STANLEY YORK,

Defendants.

DECISION AND ORDER

This is a civil action seeking to enforce an order of the Federal Communications Commission [FCC] pursuant to 47 U.S.C. §401(b). The matter is before me on plaintiff Wisconsin Bell's application for injunctive relief against the defendants' disobedience of the FCC order. For the reasons stated below, the plaintiff's application for an injunction is granted.

This controversy involves an Order of the FCC mandating the use of certain depreciation methods by telephone companies. The telephone companies sought the approval of the new depreciation methods, which allow faster depreciation of physical plant and equipment, in order to better compete in newly unregulated interstate markets. State regulatory agencies, the Public Service Commission of Wisconsin [PSC] included, opposed the use of the accelerated depreciation methods because, among

other things, it would require an increase in rates over the short term to cover the accelerated depreciation expense.

On January 6, 1983, the FCC released a Memorandum Opinion and Order in which it held that its prescribed depreciation methods and rates preempted inconsistent State depreciation methods and rates, including those prescribed by the Public Service Commission of Wisconsin. 92 FCC 2d 864. The FCC's Preemption Order was appealed to the Fourth Circuit Court of Appeals on February 11, 1983. The PSC, Wisconsin Bell, and telephone companies and State regulatory agencies from across the country participated as intervenors in that appeal.

In the spring of 1983, representatives of the FCC, Wisconsin Bell, and PSC held a meeting to negotiate new depreciation parameters, as well as the implementation of the new, accelerated depreciation method known as Straight Line Equal Life Group [SLELG]. However, the PSC continued to object to implementation of SLELG. On September 2, 1983, the FCC issued a Notice for public comment on the depreciation rates it proposed to prescribe for Wisconsin Bell for 1984. The PSC was served with the Notice. On September 28, 1983, the PSC filed comments with the FCC in response to the Notice, reiterating its opposition to SLELG. On December 14, 1983, the FCC adopted its Order prescribing Wisconsin Bell's depreciation rates, including rates based on the SLELG method. In this Order, the FCC reiterated its preemption of inconsistent State depreciation methods and rates.

On December 20, 1983, the PSC issued its final Order authorizing rates for Wisconsin Bell. In this Order, the PSC refused to authorize the use of the SLELG depreciation method as ordered by the FCC. The PSC also denied

the implementation of intrastate service rates sufficient to permit recovery of the additional intrastate revenue requirements associated with the use of the SLELG depreciation method. According to Wisconsin Bell, the additional 1984 intrastate revenue resulting from the use of the SLELG depreciation method is $4.5 million.

The suit for injunctive relief to enforce the FCC's Order was filed January 3, 1984. At that time the validity of the FCC's preemption order was still under consideration by the Court of Appeals for the Fourth Circuit. On June 18, 1984, however, that court issued its decision upholding the FCC preemption order. *Virginia State Corp. Com'n v. F.C.C.*, 737 F.2d 388 (4th Cir. 1984).

Jurisdiction over this case is derived from the Communications Act of 1934, 47 U.S.C. §401(b), and 28 U.S.C. §1337. 47 U.S.C. §401(b) provides in pertinent part:

> "(b) *Orders of the Commission.*
>
> "If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representative of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

28 U.S.C. §1337 provides in pertinent part:

> "§1337. *Commerce and Antitrust Regulations; Amount in Controversy, Costs.*
>
> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies..."

This case does not fall within the prohibition of the Johnson Act, 28 U.S.C. §1342, which provides:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a ratemaking body of a State political subdivision, where:
>
> "1. Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> "2. The order does not interfere with interstate commerce; and
>
> "3. The order has been made after reasonable notice and hearing; and,
>
> "4. A plain, speedy and efficient remedy may be had in the courts of such State."

Jurisdiction here is based on the enforcement of an FCC order under a federal statutory scheme, not diversity of citizenship or a challenge to the order's constitutionality. *See, New England Telephone and Telegraph Co. v. Public*

Utilities Comm. of Maine, 570 F.Supp. 1558, 1566 (D. Maine 1983). Therefore, the Johnson Act does not prohibit my consideration of this case.

The PSC argues that I should not restrict myself to the issue of enforcement of the FCC order, but address its validity and substance as well. I am, however, prohibited from doing so by 28 U.S.C. §2342 and 42 U.S.C. §402, which provide:

> "§2342. *Jurisdiction of Court of Appeals.*
>
> "The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or *to determine the validity* of—
>
> "1. All final orders of the Federal Communications Commission made reviewable by section 402(a) of Title 47; (emphasis added)
>
> ....
>
> "§402. *Judicial Review of the Commission's Orders and Decisions.*
>
> "(a) *Procedure.* Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Chapter 158 of Title 28, United States Code [28 U.S.C. §§ 2341, *et seq.*]."

The FCC order at issue was, as previously stated, appealed to the Court of Appeals for the Fourth Circuit where it was upheld as a valid exercise of the FCC's statutory authority.

Many of the points raised by the PSC in this case pertain to the validity of the order and the authority of the FCC to issue it. Those questions have been resolved by a court which has exclusive jurisdiction to consider them under §2342. Therefore, the only question before me is the enforcement of the FCC order.

Under §401(b) of the Communications Act of 1934, Wisconsin Bell is entitled to the injunction it seeks if certain facts are found to exist. That section provides that an injunction *shall* issue if I find that the FCC order was "regularly made and duly served," that the defendant has disobeyed the order, and that the plaintiff is injured by the defendant's disobedience.

The FCC order meets the first standard set forth in §401(b), in that it was "regularly made and duly served." There is no evidence to indicate that the FCC deviated from its regular policymaking procedure in this case. The agency followed the usual rulemaking procedure under 47 C.F.R. §§ 1.399-1.429. There is no allegation that it did not. The preemption order was published in the Federal Register and served on all State regulatory commissions. 92 FCC 2d 864, 880. Several other district courts faced with this question have held that the FCC's preemption order was "regularly made and duly served," and I find no evidence to the contrary in this case. *See, New England Telephone and Telegraph, supra* at 1571; *South Central Bell Telephone Co. v. Louisiana Public Service Comm.*, 570 F.Supp. 227, 232 (N.D. La. 1983); *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transp. Comm.*, 565 F.Supp. 17, 21 (W.D. Wash. 1983); *The Chesapeake and Potomac Telephone Co. v. Public Service Comm.*, 560 F.Supp. 844, 847 (D. Md. 1983).

I also find that the PSC has disobeyed the order. In its December 20, 1983 order authorizing depreciation rates for Wisconsin Bell, it refused to allow the use of the SLELG method. It continues to resist the use of that method, in direct contravention of the preemption order.

The PSC argues, however, that it is not a "person" within the meaning of §401(b). Therefore, the argument goes, I have no jurisdiction over it. This argument was thoroughly addressed by the United States District court in Maine in *New England Telephone and Telegraph, supra* at 1568. There the court reviewed the definition of "person" in the Act. It found that although that definition did not explicitly refer to state commissions, it did not exclude them either. The court found that the definition was inclusive, not exclusive, stating:

> "A close reading of Section 153(i) and (t) of the Act [the relevant definitional sections] reveals that the [state commission's] argument overstates the rigor of the definitional structure of the Act. Section 153 states generally that 'for purposes of this chapter, *unless the context otherwise requires*' the following definitions apply. 47 U.S.C. Anno. §153 (1962) (emphasis added). The stressed phrase makes it clear that the definitions set out in section 153 are not intended to be exclusive, exhaustive or comprehensive. Rather, they are 'guideline' definitions whose scope and meaning are, as a general principle, to be varied as the context in which they are used in the Act may require in order to effectuate the congressional intent with which they are used.
>
> ...
>
> "The statute may thus be seen to be intended to provide jurisdiction in the federal courts

> sufficient generally to enforce the provisions of statutory law and the requirements of FCC orders made pursuant to them. It intends enforcement to occur against 'all persons' who are in violation of those provisions of law and the requirements of FCC orders. So general a concept of enforcement cannot logically admit an exception based upon narrow and technical distinctions of status as to particular types of legal entities. The enforcement purpose of the Act cannot be realized with its intended generality unless 'all persons' in that phrase's broadest ambit, found to be bound by the Act or order are subject to enforcement as prescribed by section 401(b)...
>
> "That being so, there is no basis to exclude from the definition of 'any person' any entity that is legitimately subject to the compulsions imposed by the Act or FCC orders made pursuant to it. This is especially true of state regulatory bodies, *Chesapeake*, 560 F.Supp. at 847, which may be regularly expected to be subject to a greater incidence of required compliance with the Act and FCC orders than would most other categories of persons and entities except, possibly, regulated utilities."

Id. at 1567-68.

I agree with the *New England Telephone and Telegraph* analysis. The PSC is a "person" within the meaning of §401(b). Also, it has clearly disobeyed the FCC order.

Finally, Wisconsin Bell has been injured by the PSC's actions. As a result of the PSC's refusal to allow implementation of the SLELG method, Wisconsin Bell stands to lose about $4.5 million this year.

The PSC does not dispute this, but argues instead that Wisconsin Bell has failed to show the "irreparable harm" necessary for preliminary injunctive relief according to traditional equity principles. However, according to *Illinois Bell Telephone v. Illinois Commerce Comm.*, 740 F.2d 566, 571 (7th Cir. 1984), "where a plaintiff seeks an injunction to prevent the violation of a federal statute that specifically provides for injunctive relief, it need not show irreparable harm." *Id.* at 571. Therefore, Wisconsin Bell's showing of injury is sufficient for the purposes of an injunction under §401(b).

Having met the requirements of §401(b), Wisconsin Bell is entitled to the injunction it seeks. Accordingly, IT IS ORDERED:

1. That the defendants, their successors, agents and employees are permanently enjoined from disobeying the Order of the Federal Communications Commission in CC Docket No. 79-105, dated January 6, 1983, and related depreciation represcription orders including FCC Order #83-587, released December 20, 1983.

2. That the defendants, their successors, agents, and employees are required forthwith to allow Wisconsin Bell to employ the depreciation methods prescribed by the FCC, to determine Wisconsin Bell's increased intrastate revenue requirements resulting from use of such depreciation methods and to reflect that increased revenue requirement in all rate and revenue proceedings involving Wisconsin Bell, including PSC Docket #6720-TI-3.

SO ORDERED at Milawaukee, Wisconsin, this 13th day of November, 1984.

BY THE COURT:

/s/ Terrence T. Evans

TERRENCE T. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

FEDERAL STATUTES AND REGULATIONS

5 U.S.C. §552(a)(1) .

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

28 U.S.C. §1254(2)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * *

(2) By appeal or by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;... .

28 U.S.C. §2342(1)

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

* * *

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. §2349(b)

The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the

application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply.

47 U.S.C. §401

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney general of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the

punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

(d) The provisions of sections 28 and 29 of Title 15, section 345(1) of Title 28, and sections 44 and 45 of Title 49, shall be held to apply to any suit in equity arising under sections 201-222 of this title, wherein the United States is complainant.

47 U.S.C. §402(a)

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

49 U.S.C. §16(12)

Proceedings to enforce orders other than for payment of money. If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 C.F.R. §0.455

(a) All opinions and orders of the Commission (including concurring and dissenting opinions) are mailed to the parties and, as part of the record, are available for inspection in accordance with §§0.453 and 0.455.

(b) All final decisions and other documents currently adopted by the Commission having precedential or historical significance are published in the FCC Reports. Older materials of this nature are either published in the FCC Reports or are in the process of being published. In the event that such other materials are not yet published in the FCC Reports, reference should be made to Pike and Fischer Radio Regulations. See §§0.412(a) and 0.416.

(c) All rule making documents are published in the Federal Register. See §0.411(b)(2).

(d) Formal policy statements and interpretations designed to have general applicability and legal effect are published in the Federal Register and the FCC Reports. See §§0.411(b)(2) and 0.416. Commission decisions and other Commission documents not entitled formal policy statements or interpretations may contain substantive interpretations and statements regarding policy, and these are published as part of the document in the FCC Reports. General statements regarding policy and interpretations furnished to individuals, in correspondence or otherwise, are not ordinarily published. A series of individual interpretations may be collected and published in the Federal Register and the FCC Reports.

(e) If the documents described in paragraphs (a)-(d) of this section are published in the Federal Register, the FCC Reports, or Pike and Fischer Radio Regulations, they may be relied upon, used or cited as precedent by the Commission or private parties in any matter. If they are not so published, they may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission. No person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy or unless a document stating it has been published as provided in this paragraph. Nothing in this paragraph, however, shall be construed as precluding a reference to the rationale set forth in a recent document which is pending publication if the requirement or policy to which the rationale relates is contained in a published document or if actual notice of that requirement or policy has been given.